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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1135

CLAUDE Y. PAQUIN, et ux.,
Petitioners,

versus

FOUR SEASONS OF TENN., INC., et al;
NORMAN H. CRONK,
Respondent.

BRIEF FOR RESPONDENT NORMAN H. CRONK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FLOYD E. SIEFFERMAN, JR.
Counsel for Respondent
Norman H. Cronk

OF COUNSEL:

CHAMBERS, SIEFFERMAN,
ROBINSON & COOPER
Suite 464
2200 Century Parkway, N.E.
Atlanta, Georgia 30345
(404) 325-9970

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OPINIONS BELOW

The opinions below are set out in full in the appendices to Petitioners' Brief, and the opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 519 F.2d 1105 and that court's opinion on motion for rehearing at 522 F.2d 1270.

JURISDICTION

The Petition for Certiorari (pp. 2 and 3) adequately sets forth the jurisdictional requisites.

QUESTIONS PRESENTED

Petitioners' statement of "Questions Presented for Review" are not at all in accord with the record in this case. The record would support the following "questions":

(1) In a suit against a land *owner* and an *employee* of the *developer* involving a land purchase transaction occurring some years prior to the December 1973 amendments to 24 C.F.R. §1710.105 [Part II(c)(2)] would the failure of the *developer* corporation to amend its theretofore printed *Property Report* to reflect the fact of the filing six weeks prior to the transaction of a Reorganization Proceeding by the developer corporation's separate corporate parent, but the Property Report stating, many times: "Completion is dependent upon the satisfactory sale of lots . . . and the developer's ability to secure adequate financing", and there being no prejudice resulting from such Reorganization Proceeding (because the developer corporation was promptly purchased by outside interests), constitute a *per se* and *irrebutable* violation of the Interstate Land Sales Full Disclosure Act of 1968 thereby causing *absolute liability* to fall upon one of the developer's "sales" force having no knowledge of the Reorganization Proceeding but involved to some degree in the sale transaction?

(2) May the damages recoverable under the Interstate Land Sales Full Disclosure Act include prejudgment interest on the damages suffered by plaintiffs as revealed by the evidence?

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(3) Whether the Findings of Fact, Conclusions of Law and Judgment of the District Court were clearly erroneous in finding: That the "Statement of Record" and "Property Report" met the requirements of law and that appellants' evidence failed to show any misrepresentation or omission of material fact therein, and, thus, appellants failed to meet their burden of proof? [The trial court in its order of August 16, 1974 correctly observed that: "The issues raised in this appeal primarily present questions as to the sufficiency of the evidence."]

STATUTE INVOLVED

Petitioners have correctly stated that the case involves "The Interstate Land Sales Full Disclosure Act", P.L. 90-448 (15 U.S.C.A. §§1701-1720), but they have omitted material portions thereof from their petition. Reference should be had to the entire Act as it was in July, 1970 (prior to the October and December, 1970 and the August, 1974 amendments, but after the December, 1969 amendment).

STATEMENT OF THE CASE

Petitioners here, plaintiffs below, on July 12, 1970, contracted to purchase from Four Seasons of Tennessee, Inc. a single lot in a real estate development located in Coweta County, Georgia known as "Four Seasons of Georgia". Before the contract of purchase was signed by Petitioners, they (both husband and wife) had carefully inspected the development in person on a personal "guided tour", driven (in his personal automobile) by Respondent Norman H. Cronk, a part time (Sunday afternoons) employee of

the developer (Diversified Land Developers, Inc.). At that time Petitioner Claude Paquin was a graduate actuary of some distinction, and a law student. Respondent Cronk was a retired Lt. Col. from the U.S. Army.

Respondent Cronk steadfastly maintained that he was nothing more than a guide (termed a "lineman") around the property. Petitioners, on the other hand, maintained that he played some part in the pricing of the lot (by telling the petitioners that they could obtain the lot for less than the printed list price — thus acting in favor of the petitioners) and by *handing* to Petitioners some of the papers concerning the actual sale thereby became a "salesman" agent of the developer. It is undisputed that Respondent Cronk signed no papers, contracts, deeds or the like. All contractual obligations were directly between Four Seasons of Tennessee, Inc., their sales personnel (as distinguished from "linemen" such as Cronk) and Petitioners — Respondent Cronk was in no way involved.

It was not until six (6) weeks after the signing of the contract [*and after* the developer, "Diversified Land Developers, Inc." became totally disassociated from the then reorganizing "Whale, Inc."] that the Petitioners paid the balance of the purchase price. Even then they did not pay to the attorney handling the matter the deed recording costs and thus there was a delay (until after Petitioners did pay those charges) in recording their Warranty Deed. Petitioners' recording fee check did not clear the bank until *November*, 1970. Prior to the time Petitioners paid the vast majority of the purchase price they had been put on actual

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notice, by letter, of the Chapter X proceedings as to "Whale, Inc.", and the later disassociation of the Developer from "Whale, Inc." — yet they still paid. Waiver?

The Petitioners' statement of facts becomes involved with the Chapter X (and eventual bankruptcy) proceedings against a corporation known as "Whale, Inc.". *That corporation was neither the owner nor the developer of the subject property* known as Four Seasons of Georgia. Though Whale, Inc. did go through Chapter X and (much after the facts here) bankruptcy proceedings, and regardless of the prayers of its bankruptcy petition, *neither* the property owner *nor* the developer here involved did. Thus the bankruptcy of Whale, Inc. has no legal bearing on these proceedings whatsoever. There certainly was no legal requirement (either by statute or regulation in force at that time) that Whale, Inc. (or any parent or subsidiary corporation be brought into the Property Report.

Petitioners' "Statement of the Case" is *utterly without foundation in the evidence* in stating (p. 9) "[t]he developer went bankrupt . . ." Nor are Petitioners correct in stating that the trial court "refused to acknowledge the evidence of bankruptcy" [of "Whale, Inc."] as the only evidence tendered on the subject was *admitted* into evidence by the trial court.

The Petitioners mislead when theyindicate that the developer was a defendant — *it is not*. Only Respondent Cronk and the realty owner "Four Seasons of Tennessee, Inc." were ever named defendants — and

the majority of the Court of Appeals was *correct* in stating that that defendant *was* two corporations removed from "Whale, Inc.".

The many caveats contained in the Property Report (admittedly *thoroughly* read by Petitioner Paquin) pointed out to the public that:

> "*No assurances of completion can be given . . . Completion* in these, as in other areas of the development, *will be dependent upon* the *satisfactory sale of lots* at Four Seasons of Georgia *and the developers ability to secure adequate financing.*" (emphasis added)

It is correct that the developer was one step removed from "Whale, Inc.", but it was not named as a defendant in this action.

[In addition to the absolute lack of evidence as to any false or misleading statement in the Property Report, it now appears that the lot of which Petitioners complain is *not* the lot as to which Respondent Cronk had his dealings with Petitioners. It appears that Petitioners, in some way and at sometime unknown to Respondent Cronk elected to purchase a lot *other than* the lot shown to them by this Respondent, but the record is completely silent on the matter and, therefore, cannot be discussed further.]

Respondent does not agree with Petitioners "Questions Presented for Review", because *the real question here posed is whether the findings of fact by the trial court were clearly erroneous.* The Court of

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Appeals held not. This is not a question for the Supreme Court of the United States — it was a question of evidence.

SUMMARY OF ARGUMENT

Petitioners' statement of "Questions Presented" raises "straw-man" issues which are not at all in the case.

This is a case which turned solely on the evidence. There is no conflict of decisions of Circuit Courts involved. The Regulations under which this case was decided have since been changed and a decision under the old regulations controlling in this case would have no beneficial "guide-line" effect for the lower courts. In short, the petition presents nothing warranting this Court's consideration.

ARGUMENT

I. Alleged "Departure from Usual Course of Judicial Proceedings"

What is urged by Petitioners to be a mis-statement (at one point — it is clearly correctly stated elsewhere) in the decision of the Court of Appeals as to who the developer was (it wasn't a party anyway!) forms the basis of this portion of the petition. The Developer was a corporation named "Diversified Land Developers, Inc." — its only part in this action was the fact that the statute makes it (a *non-party* here) primarily responsible for complying with the requirements of the Act. It was also the employer of Respondent Cronk. It was

the corporate "son" of "Whale, Inc." and it was the corporate parent of the *owner* of the land, "Four Seasons of Tenn., Inc." the only other defendant (other than Respondent Cronk) named and served in this case. It was this other defendant — "Four Seasons of Tenn., Inc." — which was the corporation two steps removed from the Reorganizing "Whale, Inc.". The Court of Appeals, in this myriad of "Four Seasons" and other corporations, in division III of its opinion, put the burden of the Property Report preparation on the owner — "Four Seasons of Tenn., Inc." rather than on the developer — which really aided petitioners' case rather than harming it, since petitioners failed to name the Developer as a defendant.

Petitioners are plainly in error in indicating to this Court that the trial court rejected the tendered evidence of the "bankruptcy" of "Whale, Inc." :actually a Chapter X proceeding at all times material hereto). The evidence *was* received by the trial court *over this Respondent's objection.* The trial court simply did not find the "bankruptcy" to be controlling in view of the two corporation gap between a named corporate defendant and "Whale, Inc." — especially in view of the fact that both the Developer and the Owner were "divorced" from "Whale, Inc." by purchase by outside owners very early in the Chapter X proceedings.

In this same section of their brief, petitioners raise a hitherto *non-issue* — the applicable statute of limitations. This is purely a "straw-man". There was no plea of the statute — no question but that it had *not* run — nothing until this very moment when

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petitioners set it up in some vain attempt to obtain this Court's Writ of Certiorari.

II. No Conflict of Decisions

Petitioners state that the decision in the case *sub judice* conflicts with the decision of this Court in *Affiliated Ute Citizens of Utah vs. United States*, 406 U.S. 128, 153-54 (1972). The truth is that the cases are entirely different, but if anything that case supports the decision of the lower courts here. *Ute Citizens* was a fraud case under S.E.C. Rule 10b-5 in which it was held that a bank-market maker-transfer agent-virtual trustee has a duty to disclose to its principals (the stock owning Utes) the fact known to it that the stock could be sold for prices higher than that at which the bank actually sold on behalf of its stockholders-principals. It is a *fraud* case.

The case *sub judice* is *not* a fraud case. It is not a 10b-5 case. It is an Interstate Land Sales Act case in which the petitioners received a verdict against the owner, but did *not* receive a verdict against the "lineman" (a guide around the property) — Lt. Col. Cronk. There was *no* evidence of any mis-statement of material fact — much less fraud. Petitioners complaint rests solely on an alleged failure to disclose a then recent change as to the financial status of a *related*, but uninvolved, corporation — which, before the transaction was completed, was no longer even related.

III. The Supposed Undecided Question of Federal Law

The trial court held that Respondent Cronk *was* subject to the Act (which is exactly what petitioners say should be decided by this Court). Thus petitioners' "important question" has already been decided in their favor. This Court can go no further. The Court of Appeals *said* that the trial court's ruling was *more favorable* to petitioners than that court would be, in view of Cronk's relatively minor role in the purchase by petitioners — but petitioners have not been harmed by that statement of the Court of Appeals since the judgment rests on the proposition that Cronk *was* subject to the Act.

In the recent case of *Foremost-McKesson, Inc. vs. Provident Securities Company*, 423 U.S. ___, 46 L.Ed. 2d 464, 96 S. Ct. 508 (January 13, 1976) this Court held that the analogous S.E.C. Act of 1934 does not impose *absolute* liability on everyone who has anything to do with every transaction, saying: "It is inappropriate to reach the harsh result of imposing . . . liability without fault on the basis of unclear language. If Congress wishes to impose such liability, we must assume it will do so expressly or by unmistakable inference." (46 L.Ed. 2d at 478). Petitioners seek to impose absolute liability on every person made subject to the Act. Here, on consideration of the evidence, the trial court properly held that to impose liability on Respondent Cronk who was completely innocent of any wrongdoing would be too harsh a result.

This Court, we believe, would agree. The result was correct and is not in need of review by this Court.

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WHEREFORE, Respondent Cronk prays that the petition be denied.

Respectfully submitted,

FLOYD E. SIEFFERMAN, JR.,
Counsel for Respondent Cronk

Of Counsel:

CHAMBERS, SIEFFERMAN,
ROBINSON & COOPER
Suite 464
2200 Century Parkway, N.E.
Atlanta, Georgia 30345
(404) 325-9970

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing Brief have this date been served upon opposing counsel of record by placing the same in the United States mail, postage prepaid and properly addressed to:

Mr. Claude Y. Paquin
Attorney at Law
1224 Canton Street
Roswell, Georgia 30075

This ____ day of April, 1976.

FLOYD E. SIEFFERMAN, JR.